

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE PEPSI BOTTLING GROUP, INC.,

Plaintiff(s),

v.

DONALD THOMAS, et al.,

Defendant(s).

NO. C10-54MJP

ORDER ON MOTIONS

The above-entitled Court, having received and reviewed

1. Defendant Thomas' Motion to Dismiss on Summary Judgment with Prejudice (Dkt. No. 23), Plaintiff's Response to Defendant Thomas' Motion for Summary Judgment (Dkt. No. 27), and Defendant Thomas' Reply re: Motion to Dismiss on Summary Judgment with Prejudice (Dkt. No. 29);
2. Defendant Thomas' Second Motion on Summary Judgment to Dismiss Reimbursement Claim and Motion for Terms (Dkt. No. 30), Plaintiff's Response to Second Motion for Summary Judgment of Defendant Donald Thomas (Dkt. No. 36), and Defendant Thomas' Reply re: Second Motion on Summary Judgment to Dismiss Reimbursement Claim and Motion for Terms (Dkt. No. 44);
3. Plaintiff's Motion to Stay This Action Pending Election by Defendant Thomas of Whether to Settle His State Court Action or Proceed to Trial (Dkt. No. 31), Defendant Thomas' Response to Motion for Stay (Dkt. No. 33), Plaintiff's Reply to Defendant Thomas' Response to Plaintiff's Motion to Stay This Action Pending Election by Defendant Thomas of Whether to Settle His State Court Action or Proceed to Trial (Dkt. No. 45)

1 and all attached declarations and exhibits, makes the following ruling:

2 IT IS ORDERED that Defendant's Motion to Dismiss on Summary Judgment with Prejudice
3 is GRANTED, and this matter is DISMISSED with prejudice.

4 IT IS FURTHER ORDERED that the remaining motions are STRICKEN as MOOT.

5 **Background**

6 This litigation has a rather tortured procedural history. It began as an action arising out of a
7 motorcycle accident filed in King County Superior Court (No. 07-2-32226-4SEA, Thomas v. Powell,
8 et al.) by the injured party (Thomas) against the alleged tortfeasors and their insurance companies.
9 At some point during that lawsuit, the Superior Court judge issued an Order to Show Cause against
10 Pepsi Bottling Group, Inc. ("PBG") to show cause "why Pepsi Bottling Group should not substitute
11 its own draft for the tortfeasors' settlement amount." (C10-53MJP, Dkt. No. 2, p. 5.) The evidence
12 presented to this Court indicates that Thomas and the tortfeasors' insurance companies had reached a
13 tentative settlement. The proposed settlement was for an amount only slightly larger than PBG had
14 paid for the medical costs expended for Thomas' care and treatment following the accident under
15 Thomas' ERISA plan ("the Plan"). Thomas' ERISA plans provides for the reimbursement of
16 medical costs to the Plan out of any moneys received from settlement of an accident victim's claims.

17 PBG responded to the Order to Show Cause in state court by removing the matter to this
18 forum. (C10-53MJP, Dkt. No. 1.) That attempt was unsuccessful, and the case was remanded to
19 state court four months later. (Id., Order Granting Plaintiff's Motion for Remand, Dkt. No. 24.)
20 However, PBG (simultaneously with the removal of the state lawsuit) filed the instant case in this
21 court, seeking "a declaratory judgment, injunction, equitable lien by agreement, constructive trust,
22 and restitution against Defendant Thomas, and requiring Defendants Thomas, Progressive and
23 Safeco, to turn over to Plaintiff, as plan administrator for the Plan, \$501,001.74, including
24 appropriate pre-judgment and post-judgment interest. . ." (C10-54MJP, Dkt. No. 1, p. 5.) It is this
25 complaint which Defendant Thomas seeks to dismiss pursuant to his summary judgment motions.

Plaintiff, on the other hand, seeks a stay of this action until Thomas has either finalized his settlement agreement in state court or taken his state court matter to trial and received a verdict.

For purposes of this case and these motions, the Court finds the following material facts undisputed: Thomas has not finalized a settlement with either the alleged tortfeasors or their insurance companies; he has received no funds related to a settlement of the underlying state court matter and the insurance companies have set aside no specific fund from which to award Thomas a settlement should their agreement to resolve the state court lawsuit be finalized. See Declarations of Carey, Wieburg, Tidwell, Robinson, Rinehart and Maxwell, Dkt. No. 23.

Discussion

Summary Judgment Motion #1

PBG brought this federal action in its capacity as ERISA plan administrator. By statutory definition, ERISA causes of action sound in equity; they are actions

. . . by a . . . fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violation or (ii) to enforce any provisions of . . . the terms of the plan. 29 U.S.C. § 1132(a)(3)[§ 502(a)(3)] (emphasis supplied).

The Supreme Court and the Ninth Circuit are in accord:

[T]he term “equitable relief” in § 502(a)(3) must refer to “those categories of relief that were typically available *in equity*. . . Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002)(citations omitted)(emphasis supplied).

To state a cause of action under § 1132(a)(3), an ERISA plan must “demonstrate (1) that it is an ERISA fiduciary, and (2) that it is seeking *equitable, rather than legal, relief*. . . The remedies of restitution and the imposition of a constructive trust are available under § 1132(a)(3), but only as true equitable remedies. . .” Carpenters H & W Trust v. Vonderharr, 384 F.3d 667, 672 (9th Cir. 2004)(citations omitted)(emphasis supplied).

Defendant’s request for summary judgment is premised on the argument that “[w]hile a legal judgment can be brought [against] a party’s general assets, a claim in equity must be made against a specific chose in possession, thing, or asset.” Motion, p. 4. The Knudson case supports that position:

1 [F]or restitution to lie in equity, the action generally must seek not to impose personal liability
2 on the defendant, but to restore to the plaintiff particular funds or property in the defendant's
possession. Knudson, 534 U.S. at 214.

3 The Court's analysis of this case based on the material facts not in dispute is straightforward:
4 because there is no finalized settlement and Thomas has received no funds from the insurance
5 companies in the state court action, there are no "particular funds or property" in Thomas's
6 possession which can be attached in equity.

7 Furthermore, under the terms of the Plan itself, Thomas has no obligation to pay the ERISA
8 fiduciary back until he has actually received payment. PBG's own complaint acknowledges that it is
9 the receipt of money which triggers the obligation under the Plan to reimburse. See Complaint, ¶ 11,
10 p. 3. (quoting from the Plan: "*If you receive any type of payment, reimbursement or legal recovery*
11 *from the third party or an insurer, you are obligated to reimburse the plan. . .*") (emphasis supplied)

12 PBG's response to Defendant's position is well wide of the mark: Plaintiff keeps pointing to
13 the existence of a settlement and argues that Thomas's representation to the state court that there is a
14 settlement should somehow estop him from using the lack of a finalized agreement (with a resultant
15 transfer of funds) to defeat PBG's lawsuit here.

16 But the issue is not whether there is a settlement (although PBG has not produced any
17 evidence that there is one); the issue is whether there is a specifically identifiable fund (i.e., money
18 received by Thomas pursuant to a finalized agreement) which is the only proper subject of an equity
19 action. PBG refers to Thomas's failure to finalize the agreement as a "tactic" for which he should not
20 be rewarded (Response, pp. 3-4), but cites no authority that the procedure utilized by Thomas in the
21 state court action is improper or ineffective. The fact is that a state court judge has ordered PBG to
22 show cause why it should not appear in state court and substitute its own draft for the tortfeasors'
23 settlement amount; as of the noting date of this motion, it had not done so.

24 The Court notes in closing that nothing in PBG's responsive pleadings offers any
25 counterargument or contrary authority to Defendant's position regarding the absence of a "particular

1 fund or property” which could properly be attached by this Court acting in equity. The Court will
2 assume that in the absence of any such argument, PBG concedes the validity of Defendant’s position.

3 Defendant Thomas is entitled to summary judgment on the grounds plead. His motion will be
4 GRANTED and this matter will be DISMISSED with prejudice.

5 Summary Judgment #2/Motion to Stay

6 In light of the final nature of the Court’s ruling on Defendant’s first summary judgment
7 motion, there is no reason to reach the merits of the other two motions filed by the parties. The Court
8 does observe in passing, however, that PBG’s request for a stay (which seeks to halt these
9 proceedings until Thomas has either finalized a settlement or resolved his claims through trial at the
10 state court level) simply highlights the absence of any current case or controversy upon which this
11 Court may properly establish jurisdiction in this matter.

12 Defendant’s second motion for summary judgment and Plaintiff’s motion for a stay will be
13 STRICKEN as MOOT in light of the dismissal of Plaintiff’s case with prejudice.

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15 The clerk is ordered to provide copies of this order to all counsel.

16 Dated: ____ July 1 ____, 2010

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19 Marsha J. Pechman
20 U.S. District Judge
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